THE PARLIAMENT ACT AND THE BRITISH CONSTITUTION.

The Parliament Act undoubtedly alters the balance of power, and the distribution of political forces in the British Constitution. The effects of the measure will probably not be realized until it has been for some years in operation; but we must not under-estimate them; nor should we compare an Act which was deliberately intended to bring about a great change with the Declaratory Statutes of the seventeenth century.

In an interesting article on the Parliament Act which appeared in the pages of the REVIEW,[1] Mr. Jenks has suggested that the Act of 1911 has much in common with the Petition of Right of 1628, and the Bill of Rights of 1689, and may usefully be compared with those great constitutional enactments. He also contends that the Parliament Act has not fundamentally altered the character of the British Constitution because that Constitution is still legally alterable by Parliamentary enactment, and because the doctrine of Parliamentary Soverignty in legislation remains unimpaired.

It may be said at once that "fundamental alteration" is an expression the meaning of which cannot be confined to a change in the power of Parliament to alter, at its pleasure, the constitution of the country. What is called "a flexible constitution" may undergo fundamental alteration, and yet remain flexible. The transfer of political sovereignty brought about by the extension of the franchise and the redistribution of seats in 1832, and in 1885, was fundamental change in each case; and so is the transfer of legislative sovereignty to the House of Commons by the Parliament Act of 1911.

But in the first place I will follow out the suggested comparison with the two great constitutional documents referred to, with a view to ascertaining more clearly the character of the Parliament Act.

Three points of comparison and contrast stand out conspicuously. Firstly, the seventeenth century enactments did not profess to deal with the distribution of political power or the comparative claims to supremacy of one or other House of Parliament. They contained assertions of some of the elementary rights necessary to the very existence of a free people.

[1] 12 COLUMBIA LAW REVIEW 32.

The citizen is not to be deprived of his property at the arbitrary pleasure of the Executive: he should be taxed in accordance with grants made by Parliament, at the instance of the King—by Parliament as representing the community, to the King who states the needs of government. The citizen is not to be imprisoned or deprived either of freedom or property except in accordance with law, and by due process of law. The provisions against the billeting of soldiers in the Petition of Right, against the maintenance of a standing army in the Bill of Rights are based on the same rudiments of freedom; the citizen is not to be required to provide board and lodging for soldiers and mariners, nor are these to be exempt from the ordinary course of law, nor is the Executive to create, without consent of Parliament, such rules, courts and punishments as are necessary for the discipline of an armed force. The enactment as to the suspending and dispensing power is no more than an assertion that legislative sovereignty resides in the King in Parliament, and that laws made by the King in Parliament must not be nullified by the action of the King in Council. It is idle to compare the rights insisted on in these two great statutes with those claimed for the House of Commons in the Parliament Act.

But it is suggested by Mr. Jenks that the rights acquired in the Parliament Act like those asserted in the two earlier statutes are merely the assertion of long established custom. This contention necessarily breaks down in respect to two of the three operative sections of the Act, and he then endeavours to show that the older statutes though declaratory in form, are really an invasion of existing prerogative and that precedent is invoked to give colour to the assumption that they made no constitutional or legal change.

But it is impossible to set aside the series of fourteenth century statutes which were thought to have closed every door to taxation by the King without consent of Parliament, nor the Statute of Edward II which enacted that legislation must be by King, lords and commons. The right of every free man to legal process is claimed as early as Magna Charta, and the action of the Crown in withdrawing offenders from the ordinary course of justice is matter of remonstrance and statutory enactment by mediaeval Parliaments. Limitations on the prerogative of the Crown, by statute and by convention in many branches of Executive Government, have developed gradually, and have been accepted with reluctance: but almost from the moment that Parliament came into existence, these cardinal points were insisted upon, that the King could not

tax or legislate save with the concurrence of Parliament, and that no citizen could be deprived of freedom or property except by judgment of the courts of the land.

Compare these with the rights acquired by the House of Commons under the Parliament Act. We may leave out the reduction of the life of a Parliament to five years. No one has ever suggested that the duration of Parliaments is connected with the rights or privileges of the Houses *inter se*. The matter is one of great public interest: in the case of the Septennial Act it involved the moral question of the right of a Parliament to determine, without reference to the people, the period of its own existence, but for the purposes of the present comparison it may be set aside.

The assumption by the House of Commons of legislative Sovereignty qualified by the two years of grace allowed to the House of Lords, and by the possibility of a revival of the royal veto, cannot be described either as a statutory definition of existing practice, or as the assertion of a right long claimed, and half admitted in the past.

It is true that the denial of any effective voice to the House of Lords in the consideration of the amount, sources or destination of the expenditure of the year is not a new thing. The clause of the Parliament Act which deals with this matter is constantly described and treated as a mere codification of existing practice and there is no doubt that finance has for many years past been regarded as a topic special to the House of Commons. Yet even here I think it may not be difficult to show, as I shall endeavour to do, on high authority, that the enactment dealing with Money Bills extends very largely the recognized privileges of the Commons: while the definition of a Money Bill is not exempt from the perils which have always been said to attend definition.

The third distinction which may be drawn between the Parliament Act and the seventeenth century statutes goes a good deal deeper. The Petition of Right and the Bill of Rights secured rights which should be common to all for every citizen in the land. They were not passed in the interest of a party nor of a class. The Parliament Act was avowedly a party measure, designed to secure for Liberal legislation chances of passing into law as good as, or better than those of the legislation of a party which possessed a constant majority in the House of Lords.

No doubt there was, and is, a need in this matter for constitutional reform, but the object of the reform was obscured and per-

verted throughout the debates on the parliament Bill by the party spirit in which the bill was conceived. Reform is doubtless needed, and is needed in three directions. First, we require a reconstitution of the House of Lords which would make it, by reduction of numbers, a manageable working assembly, an assembly in which, so far as possible, political parties might be represented on terms approaching to equality. Secondly, a readjustment of the relations of the two Houses by provisions for joint session, or otherwise; so that, in cases of settled difference of opinion, legislation which was needed should not be held up to await the result of a general election. Thirdly, the retention, under new conditions, of the security which the people of this country have hitherto enjoyed, owing to the conservative tendencies of the House of Lords, that great social or constitutional changes should not be carried into law without a full assurance of public approval.

These objects were suggested in the Preamble, but they do not appear in the enacting clauses and they were frankly swept aside in debate. This is the language in which Mr. Asquith describes the character and purpose of the change proposed by Clause 3 of the Bill.

"It is a change initiated and advocated with one object and one only, namely, to make the progress of legislation desired by the people as represented here in the House of Commons easier and more facile than it has hitherto been—*that is to say when the Liberal party is in power.* It is to establish in that sense something like equality between the two parties in the State, and *it is to secure for us who are now in power* an equal chance of carrying our legislation."[2]

The promises of the preamble are to be left unfulfilled, until *"we, who are now in power"* can take full advantage of the new conditions created under the Parliament Act. In these three main features, then, the comparison of the great constitutional statutes of the seventeenth century with the Parliament Act wholly fails. They dealt with elementary rights of the subject against the executive, they dealt with rights which for centuries had been insisted upon and upheld; and they dealt with the rights which should be common to all, not with the opportunities to be afforded to a party.

But let us examine the provisions of this measure in detail. There are but two clauses which are of moment, for the shortening of the life of Parliaments by two years must be regarded as no more than an admission that the transfer of legislative sovereignty

[2]Parliamentary Debates, 5th series vol. XXIV, p. 1166.

to any given House of Commons must be subject to some limitations in respect of time.

The first clause, in the language of Mr. Jenks,

"* * * simply consecrates the state of things which all politicians treated as indisputable for many years prior to 1909."[3]

This statement needs a good deal of modification before it can be accepted as even approximately accurate.

The clause consists of three subsections.

The first provides that a Money Bill, to fall within the operation of the clause, must be sent up to the Lords at least one month before the end of the session, and must have failed to pass without amendment within one month after being so sent up. It may then be presented to the King for the Royal Assent, and will become an Act of Parliament, without the assent of the House of Lords.

The second defines a Money Bill, leaving the Speaker to determine whether the Bill corresponds with the definition. The third requires the endorsement of the Speaker on every Bill, which in his opinion is a Money Bill within the meaning of the Act, both when the Bill goes to the Lords and when it is presented for the Royal Assent. It further requires that the Speaker, before giving his certificate, shall consult "if practicable," two members of the Chairman's Panel.

Mr. Jenks is not correct in saying that the Speaker is required to consult "two of his colleagues": the Chairman's Panel, two members of which he is required to consult, is a body of not more than 8 or less than 4 members, whose duty it is to appoint from among themselves the chairman of Standing Committees, and who in their turn are chosen by the Committee of Selection, a body of eleven members appointed for every session by the House of Commons. Nor is it the case that the provision was introduced "as an attempt at conciliating the House of Lords." The change was made we believe in deference to the wishes of Mr. Speaker.

But these are matters of detail; it is a more serious question whether we can accept as correct the statement that the first section of the Parliament Act

"* * * simply consecrates the state of things which all politicians treated as indisputable for many years prior to 1909."

There can be little doubt now that the Lords committed a political blunder when they threw out the Finance Bill of 1909:

[3] 12 COLUMBIA LAW REVIEW 32, 36.

but it may not be difficult to show, not only that they acted within their strict constitutional rights, but that now, under the Parliament Act, they would probably be entitled to deal with such a Bill as not being a Money Bill.

Controversial legislation should stand on its merits and should not lean for support on bad or doubtful history, and the historical outcome was as follows. The right of the Commons to originate all grants of supply was unquestioned; the right of the Lords to amend Bills relating to supply had been vigorously denied by the Commons, in 1671 and later, and had never been insisted upon by the Lords. The right of the Lords to reject a Money Bill had been expressly admitted by the Commons in 1671, and had been exercised by the Lords in 1860. But by that time practical convenience, if nothing else, made it undesirable that the Lords should interfere with the financial arrangements of the year: for although these might be embodied in several Bills they constituted—and had constituted throughout the greater part of the nineteenth century—a complete scheme for the income and expenditure of the year, submitted by the Chancellor of the Exchequer to the House of Commons with the approval of the Cabinet, in his Budget speech, and adopted after discussion, and possible amendment, by the House.

In 1860 the Lords rejected a Bill for the repeal of the duty on paper, while they passed other bills providing for increased taxation to make good the loss which would have arisen from the repeal of the paper duty. While they thus kept within their admitted right to reject a Money Bill they did in fact amend Mr. Gladstone's financial scheme for the year. The Commons at once passed resolutions by way of protest; but in 1861, they took the practical step of embodying all the provisions for the imposition or remission of taxation in one Bill, so that the right of rejection, if exercised by the Lords, meant the temporary collapse of the finance of the year.

The House of Lords accepted the practice thus initiated by the Commons and, until 1909, they forebore to meddle in any way, by rejection or amendment, with the finance Bills which came before them: Mr. Jenks regards this state of things as an admission of rights which were "indisputable," and speakers on behalf of the Government so treated it, in debate, for reasons of obvious convenience. But Mr. Gladstone, speaking in 1861, not of the right of rejection but of the right of amendment, used these words:

"The House of Lords has never given this up, and I must say I think they are right. Cases might arise in which, from the

illegitimate incorporation of elements not financial into financial measures it might be wise and just to fall back on the full extent of their privileges."[4]

In 1909, the Lords thought that novelties of principle, and "elements not financial" had been incorporated into the Finance Bill of that year, and that the country should have an opportunity of pronouncing an opinion on the measure. The action may have been unwise but it can hardly be described as unjustifiable either on a historical view of their admitted privileges, or on the interpretation of the Parliament Act as tested by practice.

The Parliament Act came into operation in 1911 before the Finance Bill for that year was passed. Before being sent to the Lords it was necessary that this Finance Bill should be submitted to the Speaker in order that he might express his opinion whether it was a Money Bill as defined in the Act. The Speaker refused to certify that the Finance Bill of 1911 was a Money Bill within the meaning of the Act.

A careful study of the Bill reveals that it provides for the exercise by the Post Master General of certain powers and duties in respect of stamps, postal orders, and licences hitherto exercised by the Commissioners of Inland Revenue, either concurrently with or to the exclusion of the Commissioners. Thus the Bill failed in the requirement that it should contain "only provisions dealing with all or any" of the subjects specified as proper to a Money Bill. The Lords if they had so pleased might have rejected or amended the Bill, and it could not have been passed over their heads as provided in the Parliament Act.

The decision of the Speaker on this point serves to show that the Lords had right on their side when they dealt with the Finance Bill of 1909 as being outside the category of ordinary Money Bills: for it is difficult to suppose that the elaborate provisions for land valuation and for appeals from the decisions of the valuers would not have been treated, like the provisions in respect of stamps and postal orders in the Bill of 1911, as being outside the subjects to which a Money Bill is limited by the terms of the Parliament Act.

But the decision suggests other considerations besides the perils of definition. It may be possible to restrict the meaning of the words Money Bill to a Bill dealing with supply, taxation, appropriation, issue and account, or the raising and guarantee of loans; and to allow to a Second Chamber a free hand in dealing with any

[4]Hansard, 3rd. series, vol. 162, p. 2246.

Bill which included other matters not merely subsidiary to these. But on the other hand it is not possible to discriminate between taxation which is intended to raise revenue, and taxation designed to carry out some grave social or economic change.

The Parliament Act enables a House of Commons even in the last year of its existence to pass a Money Bill which should impose such taxation on land, or railways or Church property as would result in the nationalization of land or railways, or the disendowment of the Church; the House of Lords would be powerless to deal with the Bill: the electorate would have no opportunity of expressing an opinion upon it; and a social revolution would be carried out under the guise of a Money Bill the discussion of which under present conditions might be mechanical in the House of Commons, and would be futile in the House of Lords; while a general election would follow too promptly on the passing of this measure to give time to the people for the due consideration of its effects. But this section of the Parliament Act cannot be dismissed without some reference to the duties laid upon the Speaker, and the change which may be produced in the character of that great office.

It is difficult to overestimate the importance to the House of Commons of the maintenance of that dignified and impartial atmosphere which surrounds the Speaker of to-day. We must not forget that this was not always so, that, until the eighteenth century was well advanced Mr. Speaker held an office in the Government, and was supposed to be the mouthpiece of the Crown. The history of the Chair is long and interesting, but it is to the great Speakers of the nineteenth century that we owe the splendid traditions with which the office is now invested, and which are worthily maintained at the present time. The duty cast upon Mr. Speaker in recent years of granting or refusing the closure has tested, only to prove, the confidence of the House in the judicial fairness of its Speakers: but closure of debate is a passing annoyance to those who desire to prolong debate. The duty of determining the character of a Money Bill is one the discharge of which may involve grave political consequences to the government of the day. If at the close of the long debates on the Finance Bill of 1909 it had been required of the Speaker that he should grant or refuse his certificate that the Bill was a Money Bill, the fate of the Government might have depended on his decision. It is difficult to suppose that the occupant of the Chair can thus be brought into con-

tact with such issues of party politics and escape the suggestion of party bias, or that the choice of a Speaker at the commencement of a Parliament will henceforth be uncoloured, as it is now, by considerations of party questions which he may have to decide.

It was not difficult to construct a Parliamentary tribunal which would have been competent, and fair. On this point Mr. Jenks writes apparently without regard to the alternatives suggested in debate. The matter is now settled, for better for worse, so long as the Parliament Act remains on the statute book in its present form, and all that remains to be said is that in order to save themselves a slight effort in constructive legislation Mr. Asquith's Government have risked one of the most valued and characteristic possessions of the House of Commons.

We now come to the second section of the Act, which provides that a Public Bill other than a Money Bill or a Bill to extend the duration of Parliament shall become law, with or without the assent of the House of Lords, if it is passed by the Commons and rejected by the Lords in three successive sessions, and if two years have elapsed from the date of the first occasion of the second reading of the Bill. We may take this in connection with the third section which qualifies the effect of it by the reduction of the life of a Parliament to five years; but we should note the form of qualification. If Parliament is dissolved while a measure is still running its course under section two, and the measure has not yet been rejected in three successive sessions or is still within the two years of its first second reading, the country will have an opportunity of pronouncing on its merits at the general election which will then take place: if will have no such opportunity otherwise.

Your contributor assumes that while the first section of the Parliament Act merely gives statutory force to existing practice, the second is "a practical solution" of the difficulty arising from a deadlock between the two Houses. It is only a practical solution in this sense, that if A and B differ as to what is best to be done in the interest of C, the question is "practically solved" if B is gagged and bound by A, who then proceeds to deal with C as he pleases.

It is idle to describe this as the solution of a deadlock. Clumsy as was the old method of holding up legislation until a general election could decide the question between the Houses, it had at least the merit of making the people the umpire between Lords and Commons. Unfair as was the balance of party power in the

Lords it might at least be said that the Conservative party could not be charged with introducing measures, destructive of long established order and institutions, which need time for explanation and consideration.

Various modes of meeting the deadlock difficulty might be and were suggested—a reduction in the number, with or without change in the composition of the House of Lords, conference and joint sessions of the two Houses, or of representatives chosen by each, and *referendum* of special measures when demanded on the responsibility of a majority of one or other House. These are some of the possibilities of the settlement of a constitutional difficulty. The actual solution provided by the Parliament is the introduction of single chamber Government during the first three years of a Parliament's existence.

It may be maintained that at a general election the voters choose with their eyes open, they know the men who will form a government, and they know their programme: they are prepared to take the consequences of the Parliament Act. This is a specious argument but it will not apply to the existing conditions of politics or to the conditions of our constituton.

Snce 1885 the old party system has been invaded by the introduction of groups independent of the two great parties in the State. The Parliament elected in 1885 contained a Nationalist party, indifferent to British or imperial politics, but prepared to support the Liberals or the Conservatives, if either would offer a prospect of Home Rule. Mr. Gladstone accepted support which gave him a majority in the House of Commons, and introduced the Home Rule Bill of 1886, in obedience to the demands of the Nationalist groups. No one has ever suggested that such a measure was a feature of the general election of 1885. The Bill was rejected first by the House of Commons and then by the country, but its introduction is significant of what may happen in a House in which independent groups are prepared to give their support in return for measures which they desire, although the country may not desire them, and are able to insist on the passage of those measures without delay, although the electors may have had no opportunity of considering them.

We have now four parties in the House of Commons, the Unionists are the largest of these, then come the Liberals who form the Government, and then come the two independent, irresponsible groups, 84 Nationalists and 42 Labour members. They are irre-

sponsible because they do not contemplate the assumption of office, they exist to get what they can, the Nationalists for a party, the Labour members for a class. Without the support of these groups the Government could not retain office: and their presence is a warning that some safeguard is needed against legislation which has not been approved by the country and which may be reluctantly accepted by the Government and its supporters as the alternative to loss of office and power.

And another argument against this hasty solution of the supposed difficulties of the deadlock is to be found in the facts of the British Constitution. It is a commonplace with writers on constitutional subjects to dwell on the omnipotence of our Parliament, and the defencelessness of our institutions against organic change at the will of the majority.

The elaborate securities provided in other great democracies are absent from our constitution. Hitherto we have depended on the Conservative tendencies of our Second Chamber to secure an appeal to the people before drastic changes, whether social or constitutional, can become law. That security is now taken away: the change is something much more formidable than "the practical solution of a deadlock."

The serious issues of the Parliament Act have not received from your learned contributor the serious consideration which they deserve: on its more superficial aspects, as noticed by him, I would say but a few words.

It is true that the House of Lords retains the power of delaying a measure for two years, and it is suggested that during this period a complicated and technical measure may be improved by the efforts of the Second Chamber, while a contentious measure will be subject to scrutiny and criticism at the bar of public opinion, the expression of which may make it impossible for the measure to be passed under the operation of the Act.

We may doubt whether revision by the House of Lords, as at present constituted, would be gratefully accepted by a majority in the House of Commons which desires that legislation should be drastic, and that in some cases it shall operate as a punishment on political opponents. Nor is much credit to be obtained under such circumstances by smoothing over difficulties and mitigating the hardship of crude legislative proposals. Useful amendments might be accepted, not on their merits but to avoid delay, and the public would be informed by the organs of the government that a Bill

maimed and truncated by an ill disposed House of Lords was better than none.

We have yet to learn the value of two years delay in the passage of such highly contentious measures as the Bills for Home Rule, and Welsh Disestablishment, or the effect of public opinion in compelling amendment, or withdrawal; but this at any rate is clear, that a government which was compelled to withdraw bills of this nature because it was discovered in the course of two years from their second reading that they were repugnant to the public opinion of the country would suffer a blow to its prestige from which recovery would be difficult if not impossible.

We have also to realize that a situation new to our political life will be created by the suspension of a measure which may excite violent feeling, which has passed in a form which it is impossible to amend, and which will become law if a government can retain office for the necessary time. What for instance will be the attitude of the Nationalists and the people of Ulster while the Home Rule Bill is running the course provided for it by the Parliament Act?

There is one aspect of the Parliament Act upon which your contributor has hardly touched. It is this. The present House of Lords contains many men of great ability and wide political experience; there are also in the present House of Commons men of keen insight and ready utterance, who inevitably at no very distant date will succeed to peerages. Is it either just or wise to relegate this trained ability to an assembly the duties of which are confined to revision, suggestion and delay? I doubt very much whether it will be possible to refuse these men access to the assembly which is now the seat of legislative sovereignty.

The Parliament Act, like most constitutional machinery will probably develop in some directions which its framers did not contemplate; but it is plain that whether we regard the conditions under which it was passed, or the possibilities of its working, there is no place for the genial optimism of your contributor. England has embarked upon a course of constitutional change and we cannot now forecast the results either upon her own domestic polity, or on the diverse elements which make up the British Empire.

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